In The

SUPREME COURT OF THE UNITED STATES

October Term, 1971

No. 70-99

EVANSVILLE-VANDERBURGH AIRPORT AUTHORITY DISTRICT, KENNETH C. KENT, ELMO HOLDER, ROBERT M. LEICH, IAN F. LOCKHART, CLIFFORD K. ARDEN, JAMES A. GEYER and PAUL E. HATFIELD, on behalf of himself and all other persons similarly situated,

Petitioners,

vs.

DELTA AIRLINES, INC., EASTERN AIRLINES, ALLEGHENY AIRLINES, INC., and WILLIAM F. WOOD, on behalf of himself and all other persons similarly situated,

Respondents.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF INDIANA

REPLY BRIEF OF PETITIONERS

HOWARD P. TROCKMAN
JAMES F. FLYNN
20 N. W. Sixth Street
Evansville, Indiana 47708
Counsel for Petitioners

UNIGRAPHIC, INC., 4400 JACKSON AVE., EVANSVILLE, IND., PHONE 476-7782

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RESPONDENTS' BRIEF FAILS TO PRESENT THE GENUINE ISSUES AND QUESTIONS BEFORE THIS COURT.

It is apparent from even cursory examination of the Respondent-Airlines' Brief that the entirety of their argument is based, initially, on an erroneous premise which totally and completely fails to recognize the genuine issues before this Court. The Respondents, at page 2, begin their Brief by restating, improperly, the "Question Presented." There is absolutely no dispute in the record as to the material and substantial use of Petitioners' airport facilities by enplaning passengers (A. 51, para. 1; A. 63, para. 34) nor that such facilities are, in fact, constructed and maintained primarily for the benefit of commercial airline passengers. Respondents' Brief skillfully sidesteps the genuine issue before this Court through the use of generalities and verbal niceties. The true issue, in essence, is whether a state or local governmental body can require commerce to "pay its own way" for the valuable facilities constructed and maintained, at great expense, for the special use of commerce. Assuming an affirmative resolution of this issue, the further question which this Court is called upon to determine is whether Petitioners' use and service charge of One Dollar ($1.00) for each enplaning commercial airline passenger at Dress Memorial Airport, both interstate and intrastate, as defined by Ordinance No. 33, is reasonably related to the facilities provided.

There is no genuine issue in this case pertaining to the rights of citizens to travel among the States; nor is the number of persons who may, at a given time, travel either in interstate or intrastate commerce, relevant to the determination of the true issue.

Since the outcome of this appeal and review is of such vital concern, not only to the Petitioners, but apparently also to the Respondent-Airlines, it is not difficult to understand the Respondents' tendency to raise as many hypothetical constitutional questions as they can conceive. Respondents' "additional issues" are more apparent than real.

Petitioners will, therefore, confine themselves not to a mere restatement of the facts and law which have already been briefed, but to the contradictions and inconsistencies contained in the Respondent-Airlines' Brief.

EXISTING AIRLINE LEASE AGREEMENTS WITH DISTRICT SPECIFICALLY CONTEMPLATE THIS APPEAL.

The Respondent-Airlines have unnecessarily alluded to the Trial Court's statement that the leases between the airlines and the District contained a provision prohibiting the collection of any further rentals, fees, tolls or other charges from the Airlines, except those provided for in the lease. (Respondents' Brief, pp. 6 and 7). Reference to these leases is misleading in that: (1) As Respondents state at page 7 of their Brief, the exclusion applies only to charges assessed against the airlines, but, more importantly, (2) on September 1, 1970, when the leases with the Respondent-Airlines were renegotiated and consummated, this pending appeal was recognized. In order to remove any issues other than the constitutional issues before this Court, the following paragraph, contained in Article VIII, was written

into each of the Respondent-Airlines' leases and affirmed by said airlines:

> "Is is specifically understood and agreed that the foregoing provisions with respect to "no further charges or taxes" and the provisions of Article I, Section (e) of this agreement shall not be construed in any way to prejudice the appeal now pending by Lessor on the use and service charge Ordinance No. 33 heretofore passed by Lessor, until such appellate rights are exhausted. The parties hereto acknowledge that said appeal is presently pending before the Supreme Court of the State of Indiana, Cause No. 869 S 179, and is entitled "Evansville-Vanderburgh Airport Authority District, Kenneth C. Kent, Elmo Holder, Robert M. Leich, Ian F. Lockhart, Clifford K. Arden, James A. Geyer and Paul E. Hatfield, on behalf of himself and all other persons similarly situated, Appellants, vs. Delta Airlines, Inc., Eastern Airlines, Allegheny Airlines, Inc., and William F. Wood, on behalf of himself and all other persons similarly situated, Appellees". It is further stipulated and agreed that the term "appellate rights" shall be construed to include any possible appeal or review of said decision by the Supreme Court of the United States. In the event said appellate rights are concluded unfavorably to Lessor, it is agreed that the provisions as to "no further charges, fees or taxes" shall be regarded as totally applicable to any such charges and assessments during the contract period. It is further agreed that if said litigation is con-

> cluded favorably to the Airport, Lessee shall be given an option to renegotiate this contract by giving Lessor not less than sixty (60) days' advance written notice of Lessee's intention to do so."

While Respondents cannot deny their express agreement, which was concluded before the decision of the Indiana Supreme Court was rendered on December 23, 1970, it is apparent that they have misused a provision of their prior lease agreements in order to advance their position on this appeal. This question is, therefore, moot and is only designed to obfuscate the constitutional issue before this Court.

RESPONDENTS' MISLEADING FACTUAL REFERENCES.

In order to "clear the air" of Respondents' misleading statements, Petitioners submit the following point-for-point reply:

Contention

> The use and service charge established by Ordinance No. 33 is on the mere "act of enplanement." (Respondents' Brief 12, 13).

Reply

> The use and service charge is actually based upon the substantial use of the Airport, the existence of which would otherwise not be necessary except to accommodate commercial airline passengers (A. 53-55, para. 10-17).

Contention

The "incidence of the tax falls on interstate commerce" (Respondents' Brief 13).

Reply

The use and service charge applies equally to intrastate as well as interstate passengers (A, 53, para. 9) and the actual percentage or relationship of interstate as opposed to intrastate passengers who may be affected at a given time is not relevant or material to the genuine issues of this appeal.

Contention

The Ordinance does not affect departing passengers (Respondents' Brief 14).

Reply

The application of the use and service charge to the enplaning passenger is, in reality, a charge on the deplaning or departing passenger, because the number of enplaning and deplaning commercial airline passengers is approximately the same (A. 51, para. 1) and "the vast majority of persons enplaning aircraft at Dress Memorial Airport are either initiating the first leg of a journey which will be completed by a return flight to Evansville or, conversely, are completing the second leg of a journey which had its origin at a locality other than Evansville." (A. 61, para. 31).

Contention

The use and service charge is a burden on commerce and there is not a reasonable relationship between the charge and use of Petitioner's airport facilities (Respondents' Brief 15, 16).

Reply

The cost of maintaining present airport facilities as well as required future capital expenditures at Petitioners' airport will greatly exceed the revenues to be derived from the use and service charge (A. 62, para. 32), thereby establishing a clear and convincing relationship between the charge and the use of airport facilities.

Contention

There is no contention that the Ordinance qualifies "as a measure to protect the safety of its citizens" (Respondents' Brief 16).

Reply

The preamble and avowed purpose of the Ordinance is to provide for the present and future safety and comfort of commercial airline passengers (A. 67).

Contention

The exaction of a use and service charge requires national uniformity and, therefore, lies within the exclusive jurisdiction of Congress.

Reply

The primary and ultimate financial burden of maintaining and providing safe and adequate terminal facilities for commercial airline passengers falls upon the Petitioners (Petitioners' Brief, p. 15) and until such time as Congress and the Federal Government has fully undertaken this financial obligation, the cry of national uniformity cannot be heeded and Petitioners should not be relegated to the position of an unpaid servant of commerce.

Thus, the "burden" imposed upon commerce, which burden, incidentally, is not imposed upon the airlines, but the passengers, is designed only to require commerce to pay its fair share for the use of facilities which it enjoys. *Aero Mayflower Transit Co. v. R. R. Commissioners*, 332 U.S. 495 (1947).

RESPONDENTS' AUTHORITIES DO NOT RESPOND TO OR MEET THE ISSUES OF THIS APPEAL.

Upon close examination and application to the facts of this case, none of the Respondents' authorities are found, genuinely, to meet the issues of this appeal. As revealed in the opinion of the Supreme Court in *National Bellas Hess v. Dept. of Revenue*, 386 U.S. 753, 756, "the test is whether the State has given anything for which it can ask return." There exists absolutely no question that the Petitioner is, in fact, providing, for the primary and substantial use of commerce, expensive and valuable facilities.

Petitioners, therefore, cannot accept, as applicable, the holding of *Crandall v. Nevada*, 6 Wall 35 (1868), involving a tax which was designed to prevent persons from leaving the State of Nevada. Interestingly, the *Crandall* application was rejected in *Hendricks v. Maryland*, 235 U.S. 610, 624 (1915), where the Court held constitutional a Maryland motor vehicle registration statute because it was related to the use of valuable highway facilities provided by the State.

Likewise, Respondents' much cited case of *Joseph v. Carter & Weeks Stevedoring Co.*, 330 U.S. 442 (1947), is also irrelevant in that the tax held to be invalid was exacted on the mere privilege of engaging in business in the City of New York and did not relate to the use of governmentally provided facilities or property, and was properly distinguished in *State of Alaska vs. Arctic Maid*, 366 U.S. 199 (1966), where the *Carter* case was put aside as not controlling.

Nor does Ordinance No. 33 attempt to discriminate in favor of intrastate commerce in order to place it at an unfair advantage over that of interstate commerce, as in the case of *Ness Produce Co. v. Short*, 263 F. Supp. 586 (1966), affirmed per curiam, 385 U.S. 537 (1967).

Respondent's leading "right to travel cases" are also at great variance with the issues of this appeal. Petitioners are amazed by the Respondents' citation of *Shapiro v. Thompson*, 394 U.S. 618 (1969), (striking down a statute requiring a residency of one year before a person can qualify for welfare and assistance), and *Sherbert v. Verner*, 374 U.S. 398, 406 (1963), (striking down the denial of unemployment benefits by the

State of South Carolina to a Seventh Day Adventist who refused to work on Saturdays).

Using Respondents' logic and applying the rationale of these cases bearing on the alleged "right to travel issue", the airlines would not be permitted to charge fares for any of their passengers because such passengers would have the right to travel in interstate commerce without being burdened with a charge for the use of the airlines' facilities or the Petitioners' airport facilities. The application of the holdings in these cases to this case would be utterly ludicrous.

As a further example of the misleading line of authorities cited by the Respondents in regard to the need for national uniformity, the case of *Bibb v. Navajo Freight Lines, Inc.*, 359 U.S. 520 (1959), was cited at pages 35 and 38 of Respondents' Brief. This case involved an Illinois statute requiring the use of certain contour mud guards on the rear wheels of trucks and trailers traveling through the State of Illinois. In striking down the Illinois statute, this Court did not prohibit states from requiring mud guards on trucks. Rather, the Court held it to be an unreasonable burden on interstate commerce because other non-contour types of mud guards provided an equal measure of safety.

One of Respondents' principal cases cited in support of the "national uniformity argument" is that of *Southern Pacific Co. v. Arizona*, 325 U.S. 761 (1945), which supports the Petitioners' position that, although the commerce clause conferred on the National Government the power to regulate commerce, this did not exclude all State power of regulation where such matters are of local concern and character and their im-

pact does not seriously impede or interfere with interstate commerce.

Petitioners submit that the relatively recent Supreme Court case of *Aero Mayflower Transit Co. v. Board of Railroad Comm'rs*, 332 U.S. 495 (1947), which case both the Petitioners and the Respondents cite with approval, bears heavily on the subject appeal. In *Aero Mayflower*, a state statute imposed a tax on the gross receipts of motor carrier operations within the State of Montana. The Court recognized that Montana, by separate Statutes, imposed license and gas tax fees on motor carriers and received Federal Highway Aid. Notwithstanding, the Court, at page 503, held the Statute valid and declared that a State was not required to furnish facilities to commerce free of charge so long as interstate as well as intrastate commerce are treated equally.

Thus, Respondents have conceded, at page 33 of their Brief, that not only have courts permitted a certain degree of approximation in the method of apportionment, but have permitted impositions of flat fees designed to defray the expenses of administering regulations for the public safety and convenience and have approved the delegation of such powers to municipalities and governmental bodies, *Sprout v. City of South Bend*, 277 U.S. 163 (1928); *Morf vs. Bingaman*, 298 U.S. 407 (1946); and, further, States have the power to impose special fees on motor carriers for the privilege of using the highways, which power has been attributable, in great part, to the unusual destruction of the highways occasioned by heavy commercial motor vehicles. *Aero Mayflower Transit Co. v. Board of Railroad Comm'rs*, supra; and, further, commercial carriers who make highways their place of business may

properly be charged taxes for the use, maintenance and repair thereof. *Clark v. Poor*, 274 U.S. 554, 557 (1927).

The logic of these last cited cases applied to the facts of this case is compelling. The Respondent-Airlines make the airport, together with its runways and related facilities, their place of business. The use of these facilities and the cost of constructing and maintaining the same for commercial airline equipment and its passengers is substantial and such facilities are designed primarily for the use of commerce. (Petitioners' Brief, pp. 17-22).

Respondents' repeated claim that the need for national uniformity prohibits the exaction of a use and service charge cannot be well taken. The wild assertion that if such levies are imposed by each airport along the traveler's route the total effect on the cost of air transportation would be prohibitive is, likewise, absurd.

Similar contentions were unsuccessfully advanced in the case of *Atlantic Gulf & Pac. Co. v. Gerosa*, 16 N.Y. 2d 1, 261 N.Y.S. 2d 32, 209 N.E. 2d 86 (1965), appeal dismissed, 382 U.S. 368 (1966), wherein the Court held that the city's use tax law was not an unconstitutional burden upon interstate commerce because of the possibility of multiple state taxation.

Additionally, in the case of *Panhandle Eastern Pipe Line Company v. Public Service Commission of Indiana*, 332 U.S. 507 (1947), the Court held, at page 522, that the national interest was largely illusory on the record and that, as against the contention that State regulations would amount to a power of blocking the commerce or impeding its free flow, the Court held

that it is within the power of Congress to correct abuses in regulations if and when they appear and that the State power to regulate interstate commerce is not the power to destroy it, but the power to regulate interstate commerce in a manner reasonably related to the necessity for protecting the local interests. This case was discussed at length in Petitioners' Brief at pages 39 through 41.

A USER CHARGE IS MOST EQUITABLE

The cost of providing safe and adequate facilities for commercial airline passengers is, in reality, no different than the cost of providing safe and adequate aircraft for use by airline passengers. To allow the airlines, as well as the federal government, to charge air passengers fares and excise taxes for each segment of travel along the routes of the respective airlines and not to allow the imposition of a fair and reasonable use and service charge by the airports which afford the airlines, as well as commercial airline passengers, safe and adequate facilities, would be grossly inequitable and against the interest of safety in commerce.

The imposition of a reasonable use and service charge by the Petitioners or other commercial airports is subject to overriding regulation by Congress and review by the Courts just as the fare structures of air carriers are subject to review by the Civil Aeronautics Board. Such costs cannot be considered prohibitive when the safety of human lives is at stake.

Thus, as stated in *California v. Zook*, 336 U.S. 725 (1948), cited also by the Resepondents with approval at page 41 of their Brief, in the absence of a clear man-

ifestation by Congress to displace State regulations, States may enact similar regulatory legislation until an act of Congress overrides all conflicting legislation. *Braniff Airways, Inc. v. Nebraska State Board of Equalization and Assessment*, 347 U.S. 590 (1954); *Asbell v. Kansas*, 209 U.S. 251 (1908).

The imposition of a fixed use and service charge, undoubtedly, is the fairest and most equitable method of requiring commerce to pay its way for the facilities furnished it. While the Federal Government exacts an excise of eight percent (8%) of the gross amount of ticket purchases by all commercial airline passengers (84 Stat. 238, 26 U.S.C. 4261), the adoption of a similar type charge by any local municipality might not be fair nor have a reasonable relationship to the use of the facilities actually provided for such commerce. It is immaterial to the Petitioners how far the enplaning commercial airline passenger travels after leaving the facilities of Dress Memorial Airport since the charge is for the use of the ground facilities. The use of such facilities is the same for the enplaning passenger traveling on the shortest segment of air travel as it is for the passenger who is traveling around the world. The fee for the use of the facilities must necessarily, therefore, be a flat fee and not a percentage of the air fare.

The operation of Ordinance No. 33 is designed to assure that those using Petitioners' public facilities which are provided primarily for the benefit of commercial airline passengers, contribute fairly to the cost thereof. Since the facilities presently are supported by only the taxpayers of Vanderburgh County, Indiana, and are enjoyed by many persons, without distinction, 40% of whom reside outside the County (A. 59, para.

27), it is essential that a broader and more equitable manner of financial support for the maintenance of expensive air passenger facilities be provided via a use and service charge. Considering the ever-increasing demands for better facilities and services necessary to accommodate commercial airline passengers, it is fitting and proper that these passengers support these facilities and provide a greater share of the costs thereof through the passenger service charge.

Local governments can no longer afford the "luxury" of being the unpaid servant of commerce.

The passage of a new tax which, in this case, constitutes a use and service charge, is not a popular or appealing matter which is readily accepted among the populace. However, when local purse-strings are stretched beyond reasonable bounds, the right to require commerce to bear a fair and more equitable share of the burdens which befall local municipalities in providing facilities for the primary and substantial use of commerce, must not be denied.

Respectfully submitted,

HOWARD P. TROCKMAN
JAMES F. FLYNN
20 N.W. Sixth Street
Evansville, Indiana 47708
Attorneys for Petitioners